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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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(9)

No. 1096

PIERCE OIL CORPORATION, AND HENRY C. RIELY AND ROBERT T. BARTON, JR., AS ITS RECEIVERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Statute involved	2
The question presented	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	7
Brief in support of petition	15
Statement	16
Argument	18
I. The vital error of the court below in treating that unaccepted offer of March 31, 1936 as if it were the final contract, consists in the fact that there were material variations between the offer and the actual agreement of settlement (Appendix A to this brief)	18
II. Relief under a retroactive tax statute should not be precluded because of a prior settlement involving controverted issues having no relation to the subject of the relief afforded by the statute	19
III. The impact of positive law and departmental mandate impels recovery here	22
IV. This petition involves questions of general importance and of substance relating to Internal Revenue Statutes of the United States	23
Conclusion	24

Cases Cited

	Page
Attorney General's Opinion, 38 Op. A. G. 94	
Big Diamond Mills Co. v. *United States*, 51 F. (2d) 721	8, 9
Cloister Printing Corporation v. *United States*, 100 F. (2d) 355	11, 21
Colorado Milling & Elevator Co. v. *Howbert*, 57 F. (2d) 769	8, 9
Hord v. *United States*, 59 F. (2d) 125	11, 21
Staten Island Hygeia Ice & Cold S. Co. v. *United States*, 85 F. (2d) 68	11, 21

Statutes Cited

Revenue Act of 1938, Section 821	2, 5, 6, 7, 8, 9
Revenue Act of 1943, Sections 133, 134, 502, 512	10
Revenue Act of 1942, Sections 142, 222	10
Revenue Act of 1938, Section 813	10
Revenue Act of 1926, Section 322	10

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

Henry C. Riely and Robert T. Barton, Jr., Receivers of Pierce Oil Corporation, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above cause on January 8, 1945.

Jurisdiction

The judgment of the Court of Claims was entered on January 8, 1945. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 288, as amended by the Act of May 22, 1939 (c. 140, 53 Stat. 752).

The Statute Involved

Revenue Act of 1938, c. 289, 52 Stat. 447; Sec. 821. Interest Accruing After October 24, 1933, and Before August 30, 1935, on Delinquent Income, Estate and Gift Taxes.

Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund.

The Question Presented

Shall the taxpayer be denied the right to recover sums aggregating $166,670.87 of statutory interest in excess of the 6% rate for which relief is afforded by Section 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447), because and only for the reason that the payment of the tax and interest was made under a settlement agreement which specified to a penny the amount of 12% penal interest so involved and collected, that was concluded some two years before enactment of the retroactive relief prescribed by said Statute?

Statement

The facts are briefly summarized as follows:

While the determination of the tax liabilities under the Revenue Act of 1918 for the years 1918, 1919 and 1920 based on the income of Pierce Oil Corporation and its affiliates (herein called Taxpayer) was pending before the Board of Tax Appeals, the Commissioner of Internal Revenue caused jeopardy assessments to be made against the

Taxpayer covering asserted tax deficiencies and deficiency interest thereon to January 11, 1933. On January 13, 1933, the Collector issued jeopardy notices and demands for payment. (Finding 3, R. 20).

Because of its failue to pay within ten days after such notice and demand, "delinquency" interest, which was computed at the penal statutory rate of twelve per centum (12%) per annum, began accruing on the total of tax deficiencies and deficiency interest thereon and continued so to accrue until August 30, 1935 (and thereafter at 6 per cent under the Revenue Act of 1935), until April 30, 1936, when payment was made of the tax liabilities as finally determined (Findings 3 and 4, R. 20-21).

After trial of the controversies pending before it, the Board of Tax Appeals had determined the various issues in the cases, and among other things, ordered special assessment. Various Members of the Board dissented on two issues involving substantial portions of the taxable income upon which the deficiencies were computed (Finding 5, R. 22). No deficiencies were however determinable until special assessment could be concluded. In the course of negotiations relating to special assessment and before entry of any final order by the Board, the parties proceeded with conversations looking toward a final settlement of all controversies, the terms of which were contained in an agreement (Finding 14, R. 29-30) of April 28, 1936 (Defendants' Exhibit 7-A, R. 46-51). The aggregate of the deficiencies and interest to be paid thereunder was $2,035,721.77.[1] (Finding 14, R. 29-30.)

The agreement of April 28, 1936, provided that the parties should stipulate to the Board of Tax Appeals that the deficiencies involved were due entirely from Pierce Oil

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[1] Settlement of an incidental controversy by payment of $27,819.20 for 1920, which involved no issue before the Board, was agreed upon and consummated at the same time, but it is not here involved.

Corporation and were in the amount of $1,063,070.13 (Defendants' Exhibit 7-A, R. 46-51). The agreement further provided that appropriate notice of the Board's final orders fixing the deficiencies, together with proper notices or certificates of overassessment to reduce the jeopardy assessments outstanding to the amounts of the deficiencies should be given promptly by the Commissioner to the Collector, who thereupon should issue promptly notice and demand respecting the deficiencies, adding thereto deficiency and delinquency interest thereon, calculated up to and including April 30, 1936, in the following fixed sums:

For 1918:	$412,013.72
For 1919:	473,610.73
For 1920:	87,027.19

(Defendant's Exhibit 7-A, R. 46-51.)

The Board, where the cases were then pending, had jurisdiction to determine deficiencies in tax only but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiencies. Assessment of deficiency interest at 6 per cent from February 26, 1926, to January 11, 1933, the date of the jeopardy assessment, had also been made and was outstanding on the books of the Collector. The Bureau of Internal Revenue, with the approval of the Commissioner, accordingly made a computation of the delinquency interest for the taxable years due by reason of the jeopardy assessments in the following amounts:

For 1918:	$226,200.25
For 1919:	260,017.71
For 1920:	47,778.92

The final entries on the Collector's books show that the total amount of $2,035,721.77 was credited to payment of

deficiency tax, deficiency interest, and delinquency interest as follows:

Year	Deficiency Tax	Deficiency Interest	Delinquency Interest	Total
1918	$450,314.84	$185,813.47	$226,200.25	$862,328.56
1919	517,637.97	213,593.02	260,017.71	991,248.70
1920	95,117.32	39,248.27	47,778.92	182,144.51
	$1,063,070.13	$438,654.76	$533,996.88	$2,035,721.77

(Finding 20, R. 35).

In accordance with the agreement of April 28, 1936, the Pierce Oil Corporation, on April 30, 1936, delivered to the Collector a certified check in the amount of $2,035,721.77 (Finding 15, R. 30).

If the amounts shown as delinquent interest on the Collector's records had been computed at 6 per cent instead of 12 per cent for the period October 25, 1933, to August 29, 1935, both inclusive, the amounts of such interest paid for each of the years 1918, 1919 and 1920 would have been reduced by the respective amounts of $70,601.53, $81,156.61, and $14,912.73, a total of $166,670.87 (Finding 21, R. 36).

On November 12, 1938, petitioners filed claims for refund of excess interest alleged to have been paid on April 30, 1936 as part of the $2,035,721.77 paid on that day, for the years 1918, 1919, and 1920 on the ground that they had paid interest in excess of 6 per cent per annum on delinquent additional income taxes for each of those years for the period October 24, 1933 to August 30, 1935 and were entitled to a refund of that excess interest under the provisions of Section 821 of the Revenue Act of 1938. The Commissioner rejected those claims on May 21, 1939 (Finding 22, R. 36), and suit was seasonably instituted in the Court of Claims of the United States within two years thereafter, on May 2, 1941 (R. 1). On January 8, 1945, the Court of Claims of the United States held petitioners were not entitled to recover and dismissed their petition (R. 44).

Specifications of Errors to Be Urged

The Court of Claims of the United States in its opinion dated January 8, 1945 (R. 19-44) erred:

1. In deciding that petitioners were not entitled to recover interest in excess of 6 per cent per annum under Sec. 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447) which accrued subsequent to October 24, 1933 and prior to August 30, 1935.

2. In failing and refusing to decide that petitioners were entitled to recover interest in excess of 6 per cent per annum under Sec. 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447) which accrued subsequent to October 24, 1933 and prior to August 30, 1935.

3. In failing and refusing to decide that petitioners' payment of $2,035,721.77 included delinquent interest at 12 per cent per annum which accrued subsequent to October 24, 1933 and prior to August 30, 1935.

4. In deciding that petitioners were not entitled to recover interest collected in excess of 6 per cent per annum under Section 821 of the Revenue Act of 1938 (c. 289, 52 Stat. 447) because and only for the reason that the payment of the tax and interest was made pursuant to a settlement concluded prior to the enactment of the retroactive relief prescribed by Section 821.

5. In deciding that the retroactive Section 821 aforesaid which was intended to and did afford relief to taxpayers who had paid 12% penal interest over the period of time therein comprised did not permit recovery of the very type of interest therein contemplated when so computed by established administrative Governmental procedure.

6. In disregarding the final and binding effect of the contract between the parties to the controversy (Defendant's

Exhibit 7-A) whereby the interest for each year was explicitly segregated from the deficiencies because of administrative mandate of the Commissioner of Internal Revenue.

7. In disregarding the explicit acts and procedure in accordance with Governmental administrative mandate as required by law whereby the respondent computed and did collect 12% penal delinquency interest over the period prescribed by said Section 821.

8. In denying the petitioners' motion for a new trial and dismissing their petition.

Reasons for Granting the Writ

1. The decision of the Court below decides a federal question in a manner directly in conflict with the terms of a federal statute.

2. The decision of the Court below decides an important federal question in a manner which is in conflict with the decisions ruling the question.

3. This application involves a question of general importance and of substance relating to internal revenue statutes of the United States enacted to afford retroactive relief which have not been but should be settled by this Court.

4. This application further involves a question of general importance and of substance relating to internal revenue statutes of the United States on the issue whether administrative practice and determination concludes the Government where the same may militate to the advantage of a taxpayer.

I

The Statute in question, Section 821 of the Revenue Act of 1938, provides that any interest in excess of 6 per cent per annum accruing after October 24, 1933 and prior to August 30, 1935 on delinquent income taxes collected prior

to May 27, 1938, shall be credited or refunded to the taxpayer if a claim for refund is filed wit' in the time allowed. The statute makes no exceptions in the case of a prior settlement or compromise or in any other event.

The statute was enacted (Opinion, R. 39) because of an Opinion of the Attorney General rendered on October 24, 1933 (38 Op. A. G. 94) holding that 12% penal interest could not be separately compromised apart from the assessed deficiency to which it attached. The material parts of the Attorney General's Opinion and the authorities relied upon read as follows:

> "The several statutes provided that the interest shall be collected as a part of the tax.
>
> *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721, 725 (C. C. A. 8th). See *United States* v. *Childs*, 266 U. S. 304. The two may not be divorced and the interest compromised separately. *Big Diamond Mills Co.* v. *United States, supra*, p. 725; *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769, 772 (C. C. A. 10th)."

The respondent was bound by that Opinion. By reason of the jeopardy assessment the Commissioner was compelled in 1936 to compute the deficiency interest up to the date of the jeopardy assessment at 6% and the delinquency interest thereafter at 12% until August 30, 1935, the period over which the pertinent statute affords relief.

Notwithstanding the fact that the Attorney General's Opinion, upon which Section 821 was predicated, was rendered on October 24, 1933, the Court below has seen fit to ignore the effect of that Opinion as well as the express purpose for which Section 821 was intended to afford relief, as appears in the excerpt from the Congressional Record quoted verbatim in the Court's opinion.

The sum paid in compromise included interest at 12% between the effective dates. The Commissioner of Internal

Revenue computed interest at 12 per cent (Finding 18, R. 32).

Interest was required to be included in the amount received in settlement, for interest must be collected as a part of the tax; the two may not be divided and the interest compromised separately. *Big Diamond Mills Co.* v. *United States*, 51 Fed. (2d) 721 (C. C. A. 8th, 1931); *Op., Atty. Gen., ubi supra.* The decision of the Court below denying petitioners' right to recover the interest collected—pursuant to the compromise agreement—is directly contrary to the provisions of Section 821 of the Revenue Act of 1938.

II

The decision of the Court below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Big Diamond Mills Co.* v. *United States, supra,* and the decision of the Circuit Court of Appeals for the Tenth Circuit in *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769 (1932).

In the *Big Diamond Mills* and *Colorado Milling* cases, interest paid pursuant to compromise agreements was held to be recoverable where the tax was later refunded because the tax and the interest constituted a single liability.

III

This case involves a question of general importance and one of substance relating to the construction and application of the internal revenue statutes of the United States affording a taxpayer retroactive relief which has not been settled or determined by this Court.

Section 821 of the Revenue Act of 1938 is merely symptomatic of countless other statutes affording retroactive relief of which a substantial number are found, for example, in the Revenue Acts of 1942 and 1943.

Attention is invited, among others, to the following enactments:

REVENUE ACT OF 1943	
Sec. 133	Relief in case of excess deductions of estates and trusts.
Sec. 134	Maintenance trusts (*Stuart* case rule).
Sec. 502	Relief—Certain discretionary trusts in connection with gift tax.
Sec. 512	Distributions by Personal Holding Companies.
REVENUE ACT OF 1942	
Sec. 142	Nonrecognition of loss and determination of basis in certain Railroad Reorganizations.
Sec. 222	Excess profits tax relief by reconstructing income in base period years 1936-1939 (Sec. 722 of Code).
Sec. 222	Relief for instalment basis taxpayers and taxpayers with income from long-term contracts. (Added Sec. 736 to Code).
REVENUE ACT OF 1938	
Sec. 813	Remission of interest and penalties on taxes imposed by the Revenue Acts of 1917 and 1918 upon citizens in a possession of the United States.
REVENUE ACT OF 1926	
Sec. 322	Amended Sec. 301(a) of the 1924 Act so as to reduce existing rates and impose the lower rates prescribed by the Revenue Acts of 1918 and 1821.

In many instances, aside from the present case, there have been or will be settlements arrived at involving questions for which the retroactive statute has or will afford explicit relief to the taxpayer. The aspects upon which relief is so afforded frequently do not enter into the consideration of either the taxpayer or the Government at the

time of the settlement because there was then no doubt as to the law.

Such retroactive statutes akin to Section 821, involved herein, are absolute; they do not contain, any more than Section 821, an exception where the tax for the fiscal period affected may have been compromised or settled.

The Taxpayer respectfully submits that there are no decisions by this Court relating to the effect one way or the other of settlements or compromises upon retroactive relief afforded by statute enacted subsequent to the settlement, which is precisely the situation presented hereby.

There is a conflict below, as well, which bears a strong analogy to the situation presented here. The Court of Appeals for the Second Circuit held in *Staten Island Hygeia Ice & Cold S. Co.* v. *United States*, 85 F. (2d) 68 (1936) and *Cloister Printing Corporation* v. *United States*, 100 F. (2d) 355 (1938) that the taxpayer could maintain a suit to recover amounts of taxes and interest paid pursuant to compromise settlement agreements where the tax was later held to have been uncollectible at the time the payment under the compromise settlement was made. On the other hand, the Court of Claims held in *Hord* v. *United States*, 59 F. (2d) 125 (1932) that a compromise settlement agreement precluded the taxpayer's recovery of interest notwithstanding the fact that subsequent to the compromise settlement the collection of the tax was held to have been barred by the statute of limitations.

The increasing frequency of internal revenue statutes affording retroactive relief, and the prospect of future enactments to the same effect resulting from the necessary degree and extent of taxation incident to the present conflict, should impel a determination by this Court of the effect of a compromise or settlement antedating the enactment where the latter does not in terms except cases compromised or settled from the ambit of the relief intended.

IV

By reason of the Attorney General's Opinion of October 24, 1933, and the authorities relied on by him and hereinbefore cited, the Commissioner of Internal Revenue was compelled to compute the delinquency interest upon the jeopardy assessment at 12% upon the sum of the deficiency and the deficiency interest from January 13, 1933, the date of the notice and demand.

The findings as well as the record disclose that the respondent exacted and the Taxpayer paid substantial interest at 12% for the period October 24, 1933 to August 30, 1935 comprised in Section 821 of the 1938 Revenue Act. These payments were made because of administrative and procedural acts as well as requirements of the respondent by which the Taxpayer contends that the respondent is bound.

We respectfully submit that this aspect of the case presents another question of general importance and one of substance relating to the construction or application of statutes of the United States involving the internal revenue which have not been but should be settled by this Court.

The Taxpayer does not seek to invoke any doctrine of estoppel against the Government. The question, on the contrary, is whether penal 12% interest determined, computed and demanded by the Government and paid by the Taxpayer can be transmuted into something else or otherwise disregarded when a retroactive statute affording relief, concededly not contemplated by either party at the time of the settlement, impels its return to the Taxpayer without qualification.

It is respectfully submitted that no decision of this Court has ever passed upon the binding effect of a procedural and administrative determination by a Governmental taxing agency upon relief subsequently afforded by a retro-

active statute, and that a decision of this question should be had in this Court in order that taxpayers as well as the Government may be apprised whether they may or may not rely upon factual circumstances and construction by Government departments, in the interest of certainty properly attendant upon the administration of the tax laws.

WHEREFORE, your Petitioners respectfully pray in

Conclusion

That this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States should be granted.

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UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Upon this application for a Writ to the Court of Claims, we have incorporated in the Petition the basis of jurisdiction, together with the facts disclosed by the Record.

This Brief will therefore be limited to the application of those facts and of the few pertinent authorities, to the specifications of error urged, and the consequent reasons for granting this Writ.

As stated in the Petition, the case involves Section 821 of the Revenue Act of 1938, enacted some two years after the petitioner had paid $2,035,721.77 of income taxes and accrued interest thereon for the taxable years 1918, 1919 and 1920, under an agreement of settlement.

That very agreement, as implemented by legal and administrative mandate, impelled payment of a substantial portion of the amount of the agreed settlement as the interest on delinquent taxes referred to in the Statute, at the rate of 12% that accrued after October 24, 1933 and prior to August 30, 1935.

The Statute reads as follows:

> "Sec. 821. Interest Accruing after October 24, 1933, and before August 30, 1935, on Delinquent Income, Estate, and Gift Taxes.
>
> Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund."

The relief intended is retroactive. Manifestly no part thereof was or could have been contemplated by either party when the payment was made by petitioner to the Government on April 30, 1936.

The Genesis of the Statute

Section 821 was enacted as the result of an Opinion by the Attorney General rendered on October 24, 1933 (38 Op. A. G. 94), holding that 12% delinquency interest could not be separately compromised apart from the assessed deficiency to which it attached. This is manifest from the Senate debate the explanation of which appears in the Congressional Record and is quoted in full in the Opinion in the Court of Claims (R. 36).

We invite particular attention to the statement by Senator King (Opinion, R. 38):

> "For many years the Treasury in such cases compromised interest liability for 6 percent, and in 1935 the exclusive 12-percent rate was reduced to 6 percent on the recommendation of the Treasury. In the case of a comparatively few, however, the Treasury was prevented from compromising and was compelled to collect the 12 percent because of an opinion of the Attorney General rendered in October 1933."

The Petition sets forth the pertinent portions of that Opinion (ante, p. 8).

As the result of the jeopardy assessment levied by the Government against this taxpayer on January 13, 1933, penal "delinquency" or "delinquent" interest (as it is variously referred to in the Opinion) at 12% annually accrued and became payable on the aggregate of deficiencies and deficiency interest from January 13, 1933 until August 30, 1935, after which date the rate of delinquency interest was reduced to 6% by the Revenue Act of 1935.

But as the result of the Attorney General's ruling, the Government was compelled to include 12% delinquency interest upon the deficiencies and deficiency interest in every instance, even where the deficiency was settled by agreement with the taxpayer.

That is precisely what occurred here. The Opinion as well as the record discloses the precise amount to a penny of the $2,035,721.77 paid by the taxpayer on April 30, 1936 that consisted of delinquency interest at 12% and 6%. We invite attention, for example, to (1) the computations made by the Treasury (Finding 12, R. 27); (2) the records on the books of the Collector of Internal Revenue (second tabulation in Finding 16, R. 31), and (3) the results of the assessments and overassessments so appearing (Finding 20, R. 35).

The final agreement of settlement between the parties which is *Defendant's* Exhibit 7-A (a copy of which we be leave to annex to this Brief as Appendix A), sets out i Paragraph 2 thereof the precise amounts of interest re flected in the findings above referred to, the breakdown o which into tax deficiency, deficiency interest and delinquenc interest is specified in Findings 12, 16 (second tabulation and 20, R. 27, 31, 36).

The Government has so far successfully sustained it thesis respecting the alleged effect of the original offer o the taxpayer dated March 31, 1936 that is incorporated i full in Finding 10 (R. 24-26).

ARGUMENT

I

The Vital Error of the Court Below in Treating That Unaccepted Offer of March 31, 1936, as if It Were the Final Contract, Consists in the Fact That There Were Material Variations between the Offer and the Actual Agreement of Settlement (Appendix A to This Brief).

The text of Appendix A shows on its face that at the time, on April 28, 1936, when the instrument was executed, one month after the offer of March 31, 1936:

(a) The Commissioner still had the previous offer "under consideration."

(b) That offer had been "orally modified."

(c) One modification of the prior offer was the require ment that plaintiff relinquish its right to refunds for prior years amounting, with interest, to about $37,000.

(d) Execution of that agreement (of April 28, 1936) by the Commissioner was to constitute acceptance of the offer as modified.

(c) Unless and until the contract of April 28, 1936 was executed by or on behalf of all parties there was to be no agreement between them.

That contract is only incidentally referred to in the findings or the opinion. In the face of its terms how can a finding of any previous "acceptance" be justified? Any such finding is directly contrary to the express recitals and provisions of the contract, which reduced to writing in final form all previous offers, negotiations, and modifications. It is the only instrument setting forth the agreement between the parties after all the "trading" was done.

II

Relief under a Retroactive Tax Statute Should Not Be Precluded because of a Prior Settlement Involving Controverted Issues Having No Relation to the Subject of the Relief Afforded by the Statute.

Had Section 821 of the 1938 Revenue Act not been passed, no question could possibly have arisen. That Act however afforded relief in respect of one feature of the settlement that could not possibly have been contemplated by either party at the time the transaction was concluded.

The relief so afforded was explicitly made retroactive.

The Court below has denied recovery on the ground that the Statute was not intended to apply where the parties had settled a tax deficiency by agreement, and notwithstanding that the Statute is absolute and does not contain any qualifications where a settlement has been had.

This is the principal factor that has raised the issue we have asked this Court to consider, in connection with which we invite attention to Specifications of Error Nos. 4 and 5, together with the exposition following Reason No. III of the Petition why we believe the Writ should be granted.

There are today and are developing in increasing number instances where retroactive relief is afforded to a taxpayer. Large sums of money and substantial rights are involved in the construction of those statutes. A type of case that is bound to arise in increasing frequency will result from agreed settlements of tax claims resulting from certain features of interpretation that may be doubtful, but where other features of the law may be deemed free from doubt.

If thereafter there is a retroactive statute affording relief in respect of the feature that previously—when the settlement was made—appeared free from doubt, and the computation of a possible refund is clear, as in this case, will the fact of settlement preclude recovery?

In this instance, for example, both parties conceded in 1936 that positive law and administrative mandate impelled the collection of 12% delinquency interest between the effective dates of Section 821. That Act thereafter afforded the taxpayer in positive language the right of recovery to the extent that the interest exceeded 6%.

The relief afforded some two years later was not within the contemplation of the parties. The settlement resulted not from any dispute respecting the rate of delinquency interest but because of numerous features unrelated thereto that arose in the course of this lengthy and complicated litigation.

Corresponding problems are bound to arise in respect of the application of other statutes affording retroactive relief. There is an acknowledged trend towards effecting settlements arising on conflicting interpretations of internal revenue statutes and regulations that have developed, particularly as the result of the war.

Statutes affording retroactive relief are being enacted in increasing numbers and will in all probability continue to be enacted. Many of these settlements are made in the light of established law as to one factor that is involved, which

may well be and often is completely changed by subsequent enactments affording relief to the taxpayer.

If the right to recovery resulting from the retroactive provision affording relief is clear, the prior settlement should not militate against such right of recovery.

There Is a Conflict in the Decisions Below under a Closely Kindred Problem

There is, as stated in the Petition, a closely analogous legal situation where a conflict does exist. We refer to those instances where a settlement has been closed upon the assumption of a certain state of the law. Thereafter, the Courts decide that same question of law otherwise by one or more subsequent decisions.

Thus, the Court of Appeals for the Second Circuit held in *Staten Island Hygeia Ice & Cold S. Co.* v. *United States*, 85 F. (2d) 68 (1936), and *Cloister Printing Corporation* v. *United States*, 100 F. (2d) 355 (1938), that the taxpayer could maintain a suit to recover amounts of taxes and interest paid pursuant to compromise settlement agreements, because the Courts had in other cases subsequently decided that the particular tax was uncollectible at the time the payment under the compromise settlement was made. On the other hand, the Court of Claims held in *Hord* v. *United States*, 59 F. (2d) 125 (1932), that a compromise settlement agreement precluded the taxpayer's recovery of interest notwithstanding the fact that subsequent to the compromise settlement the collection of the particular tax was held by another Court decision to have been barred by limitation.

Aside from the foregoing factors, this Court has at no time construed Section 821 of the 1938 Revenue Act. The Government will doubtless argue that few if any cases

necessitating that construction have arisen within the Department, but that is not the issue here.

The scope of this application directly involves the complete ambit of statutes affording tax relief that may be enacted after there has been a settlement that did not contemplate the change in the law subsequently effected.

III

The Impact of Positive Law and Departmental Mandate Impels Recovery Here.

Although the petitioner paid no more as the result of the final agreement than it was prepared to pay in settlement of the deficiencies and interest, the respondent is nevertheless met by the mandate of its own law and departmental practice.

As the result of the Attorney General's Opinion, delinquency interest was computed at the statutory rates and included a substantial accrual of 12% interest between the effective dates specified in the Act, because that Opinion *compelled* such computation and payment.

The Court below, in adopting the Government's contention, laid stress upon the so-called "lump sum" offer previously made by the taxpayer. It should be a complete answer to this contention that affirmative law and administrative practice rendered the acceptance of that offer legally impossible. The Government was of course at liberty, any time before the final contract (Appendix A to this Brief) was signed by the Commissioner of Internal Revenue, to reject the offer of March 31, 1936, and there is no evidence whatever that the offer itself was ever accepted. The final contract executed by the parties on April 28, 1936, embraced a materially different "offer."

It may also be that the official having charge of the negotiations or even the taxpayer may at first have over-

looked the form and substance of administrative compulsion that resulted from the Attorney General's Opinion. The fact remains that the settlement both in form and substance comprised 12% delinquency interest of the type for which the statute affords explicit relief.

There accordingly arises the serious and important problem whether the respondent may compietely disregard and effectively ignore the necessary result of its own laws and regulations—those that may and undoubtedly have resulted in benefit to the Government—by impelling payment of 12% delinquency interest by other taxpayers as the result of the Attorney General's Opinion.

As stated in the Petition, the issue does not involve the problem of estoppel proper. What it does involve is the obligation of the respondent to abide by its own laws, regulations and administrative practice, an issue that has been raised in Specifications of Error Nos. 6 and 7 and is expounded in the Petition as Reason No. IV why we believe this Writ should be granted.

IV

In Summary

This Petition Involves Questions of General Importance and of Substance Relating to Internal Revenue Statutes of the United States.

The foregoing exposition should establish that there are at least two important isues that are directly presented herein with respect to which the Government, as well as any taxpayer, may and should desire clarification in the interests of certainty relating to the construction and administration of the internal revenue laws.

Settlements predicated upon one or more doubtful issues, where other issues at the time are not doubtful, may

well be and doubtless will have to be considered in th light of subsequent laws affording retroactive relief affec ing the issues on which there was no doubt at the time o the settlement.

A reading of the numerous statutes affording retroa tive relief to taxpayers, for example, those referred to i the Petition, discloses that they are absolute in their term as is Section 821, and are not circumscribed by the factu of any previous settlement or compromise of the tax li bility for the years involved, precisely as appears from t text of Section 821.

Administrative practice that impels a result requir by mandates of positive law and regulations should not lightly overlooked in determining the rights either of ta payers or of the Government.

We respectfully urge that these questions clearly wa rant a review of the decision below, wholly aside from t failure of this Court or of any other Court ever to ha construed Section 821 of the Revenue Act of 1938, as w as the manifest error in the decision of the Court of Clai

Conclusion

A writ of certiorari to review the judgment of the Cou of Claims in this case should be granted.

Respectfully submitted,

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JOHN A. GAGE,
Attorneys for Petitioners

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APPENDIX A

(Defendant's Exhibit 7-A)

AGREEMENT

WHEREAS there are now pending before the United States Board of Tax Appeals (Docket Nos. 49702, 49703, 49704 and 71413) and the Bureau of Internal Revenue certain questions affecting the liabilities of Pierce Oil Corporation, Pierce Pipe Line Company and Pierce Navigation Company, as taxpayers, and Pierce Petroleum Corporation, as transferee, (hereinafter sometimes called taxpayers) for taxes, interest and penalities for the years 1918, 1919, 1920 and years prior thereto, and

WHEREAS the Pierce Oil Corporation on March 31, 1936, submitted in writing, in behalf of itself and the remaining taxpayers, an offer of settlement (later orally modified) relating to deficiencies, overassessments and interest for 1918, 1919, 1920 and years prior thereto, and an offer in compromise of liabilities for punitive interest and penalties respecting delinquency in payment of the original assessment for the taxable year 1920, which offers are now under consideration by the Commissioner of Internal Revenue (hereinafter sometimes called Commissioner), NOW THEREFORE:

It is hereby stipulated and agreed by and between these taxpayers and the Commissioner that upon acceptance by the Commissioner of taxpayers' offer to pay in full settlement of all liabilities for deficiencies (and interest thereon up to and including April 30, 1936) for the years 1918, 1919 and 1920 the sum of $2,035,721.77, plus relinquishment by taxpayers of all rights and claims to overassessments for years prior thereto (which acceptance is evidenced by the execution of this Agreement by or on behalf of the Commissioner), and upon acceptance by the Commissioner of taxpayers' offer to pay the sum of $27,819.20 in full compromise of all liabilities for said punitive interest and penalties respecting delinquency in payment of the 1920 assessment referred to above (which acceptance is evidence by

the execution of this Agreement by or on behalf of the Commissioner), the taxpayers shall pay said sums to the Collector of Internal Revenue, Second New York District, and such sums shall be accepted by the Collector in full and complete settlement and compromise of all liabilities and claims against them as taxpayers or as transferees under said Docket Nos. 49702, 49703, 49704 and 71413, and of said liability for punitive interest and penalty on the original assessment for 1920, more fully described in paragraph 3 of this Agreement; and upon payment of said sums to the Collector by the taxpayers the following acts and things shall be done immediately and the following agreements shall become effective and binding:

1. The parties shall stipulate to the United States Board of Tax Appeals (hereinafter sometimes called the Board) in Docket Nos. 49702, 49703 and 49704 that the deficiencies therein involved are due entirely from Pierce Oil Corporation and are in amounts as follows:

Years	*Deficiency*
1918	$450,314.84
1919	517,637.97
1920	95,117.32

Final orders shall be entered therein by the Board to that effect.

2. Appropriate notice of the Board's final orders fixing the deficiencies as above set out, together with proper notices or certificates of overassessment to reduce the jeopardy assessments presently outstanding against these taxpayers to the final liabilities as set out in paragraph 1 above, and to eliminate the jeopardy assessments presently outstanding against Pierce Petroleum Corporation as transferee under Docket No. 71413, shall be give promptly by the Commissioner to the Collector, who thereupon shall issue promptly notice and demand respecting said final deficiencies, adding thereto interest thereon, calculated up to and including April 30, 1936 (so that said final deficiencies and said interest thereon, if payment is made on or before

April 30, 1936, shall total the stipulated sum of $2,035,721.77) as follows:

On Deficiency for	*Interest*
1918	$412,013.72
1919	473,610.73
1920	87,027.19

3. Following entry of final orders by the Board as aforesaid the Commissioner may take such action as may be necessary to cancel any and all overassessments to taxpayers' benefit of tax liabilities for years prior to 1918, particularly the overassessments set out in the deficiency notice of June 3, 1930 (copy of which is attached to the petition in Docket No. 49702) since taxpayers, as a part of their ter of settlement, agree to (and do hereby) withdraw, waive and relinquish any right to overassessment, refund or credit on account of any overpayment of any tax liability for any year prior to 1918.

4. The parties will agree that there is no tax due to the United States Government from the petitioner in Docket No. 71413 for the years 1918, 1919 and 1920, or any of them, and that simultaneously with the action outlined in paragraph 1 above, the parties shall stipulate to the United States Board of Tax Appeals in Docket No. 71413 that Pierce Petroleum Corporation is not liable at law or in equity as transferee for any tax or other liability of the the other taxpayers named herein, or any of them, and that the Board shall enter a final order to that effect.

5. At the time of giving appropriate notice to the Collector respecting final deficiencies and interest as outlined in paragraph 2 above, the Commissioner shall also give appropriate notice to said Collector of his acceptance of taxpayers' offer in compromise of assessments for punitive interest and penalty now outstanding, and shall direct said Collector to receive payment from taxpayers of the sum of $27,819.20 in full and complete settlement and compromise of the outstanding claims of the Bureau for such unpaid punitive interest and penalty (totaling $180,900.44) on the original tax assessment for 1920.

6. Since substantially all the property of Pierce Oil Corporation is now deposited in escrow to secure the payment of the liabilities which are the subject of this stipulation, it is necessary that said Pierce Oil Corporation avail itself of such property in order that it may by sale, pledge or other disposition thereof raise funds by which to make the payments specified above. To that end the Commissioner shall issue appropriate instructions to the Collector and to the escrow agents, instructing and authorizing them to co-operate with the taxpayers as fully as is consistent with due protection of the Government's rights under the present escrow agreement with a view to enabling the taxpayers to obtain the money to pay said sums; and to provide for the release and delivery to taxpayers' representatives of all of said property simultaneously with and upon the payment to said Collector by taxpayers of the amounts of $2,035,721.77 and $27,819.20, above mentioned. The Commissioner shall also instruct said Collector and said escrow agents that upon payment by taxpayers as aforesaid, the bond heretofore filed by Pierce Oil Corporation under date of May 17, 1934, in the sum of $5,000,000.00 shall be discharged and canceled and said escrow agreement relating thereto shall likewise be fully discharged, canceled and terminated, and that they shall deliver to taxpayers proper release or other evidence of said discharge and cancelation.

7. For the same reasons mentioned in paragraph 6 above, it is necessary that the property of Pierce Petroleum Corporation deposited in escrow agreement under date of May 17, 1934 in connection with bond given that date in the amount of $5,000,000.00 be made available to taxpayers for the purpose of raising funds by which to make the said payments. To that end, the Commissioner shall instruct and authorize the Collector and (through him) the escrow agents to release to taxpayers' representatives upon payment by them of the said amounts of $2,035,721.77 and $27,819.20 all of the property of the Pierce Petroleum Corporation now deposited in escrow as aforesaid except 60,000 shares of the capital stock of Consolidated Oil Corporation.

8. The Commissioner shall authorize the Collector to cancel and release the present bond and to accept from the Pierce Petroleum Corporation in lieu thereof a new bond in the penal sum of $6,000,000.00 conditioned upon substantially the same terms as the bond now in effect and referred to herein and in paragraph 7 above, except that said new bond shall not include within its terms any provision as to transferee or other liability under Docket No. 71413, but shall be conditioned upon payment by Pierce Petroleum Corporation of its liabilities as a taxpayer for the years 1927, 1928, 1929 and the period January 1 to June 30, 1930 under Docket No. 71414, as more particularly described in the present bond. The 60,000 shares of Consolidated Oil stock to be retained by the Collector and the escrow agents, as mentioned in paragraph 7 above, shall thereupon be deposited in escrow in connection with the new bond just mentioned upon terms substantially the same as those of the present escrow agreement, excepting therefrom, however, any reference to said transferee liability.

9. It is further agreed that as a part of this settlement and compromise, both parties waive and relinquish all rights to appeal from the decisions of the United States Board of Tax Appeals in Docket Nos. 49702, 49703, 49704 and 71413, stipulated hereunder to be entered therein. This waiver of appeal does not apply to any future decision of the Board of Tax Appeals in Docket No. 71414 respecting the liability of Pierce Petroleum Corporation as taxpayer for the years 1927, 1928, 1929 and the period January 1 to June 30, 1930.

10. It is further agreed that unless and until this stipulation is accepted and executed by or on behalf of all parties hereto, it shall be of no effect for any purpose, and will not be admissible in evidence and will not be used in any manner for the purpose of influencing any tribunal in any trial or appeal in connection with any of the transactions, litigations, or proceedings which are made the subject of this stipulation, or referred to herein.

11. The Commissioner, the Collector, and other appropriate officers of the Bureau will co-operate fully with taxpayers in the matter of making release and delivery of the

collateral now deposited in escrow as security under the present bonds hereinabove mentioned simultaneously with payment by taxpayers of the sums herein stipulated to be paid, and in the manner of expediting the entry of orders, the forwarding of certificates of overassessment or other necessary instructions to the end that the Collector's books may be cleared of all charges now outstanding against taxpayers for the years 1918, 1919 and 1920 and the provisions of this stipulation carried out as promptly as possible.

12. Nothing contained in this stipulation is to conclude or determine any rights or liabilities of Pierce Oil Corporation and Pierce Petroleum Corporation as between themselves or each other.

EUGENE UNTERMYER,
Attorney for Pierce Oil Corporation, Pierce Petroleum Corporation, Pierce Pipe Line Company, and Pierce Navigation Company.

GUY T. HELVERING,
Commissioner of Internal Revenue.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

Dated: April 28, 1936.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	9
Conclusion	13

CITATIONS

Cases:	
Big Diamond Mills Co. v. *United States*, 51 F. 2d 721	12
Cloister Printing Corp. v. *United States*, 100 F. 2d 355	12
Colorado Milling & Elevator Co. v. *Howbert*, 57 F. 2d 769	12
Hord v. *United States*, 59 F. 2d 125	12
Pierce Oil Corp. v. *Commissioner*, 32 B. T. A. 403	4
Staten Island Hygeia Ice & Cold S. Co. v. *United States*, 85 F. 2d 68	12
Statutes:	
Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 821	2, 9, 12
Revised Statutes, Sec. 3229	2, 10, 11
Miscellaneous:	
Opinion of the Attorney General, October 24, 1933, 38 Op. A. G. 94	11
Opinion of the Attorney General, October 2, 1934, 38 Op. A. G. 98	11

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1096

PIERCE OIL CORPORATION AND HENRY C. RIELY AND ROBERT T. BARTON, JR., AS ITS RECEIVERS, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 36–44) is reported in 55 F. Supp. 731.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1945 (R. 44). The petition for a writ of certiorari was filed on April 2, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether petitioners paid any "interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes" computed in excess of the rate of six per cent per annum, within the meaning of Section 821 of the Revenue Act of 1938, so as to be entitled to recover the excess over six per cent per annum as therein provided.

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 821. INTEREST ACCRUING AFTER OCTOBER 24, 1933, AND BEFORE AUGUST 30, 1935, ON DELINQUENT INCOME, ESTATE, AND GIFT TAXES.
>
> Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund.

Revised Statutes:

> SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of

the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.

STATEMENT

The special findings of fact of the Court of Claims (R. 19–36) may be summarized as follows:

Pierce Oil Corporation, hereinafter referred to as the taxpayer, was a Virginia corporation dissolved in 1940. Henry C. Riely and Robert T. Barton, Jr., are its receivers, appointed with authority to prosecute this suit. (R. 19.)

The taxpayer filed federal income and profits tax returns for the calendar years 1918, 1919, and 1920. After the Commissioner of Internal

Revenue proposed deficiencies thereon, petitions were filed with the United States Board of Tax Appeals. While the petitions were pending, the Commissioner made a jeopardy assessment of deficiencies and deficiency interest. Jeopardy notices and demands for payment thereof issued on January 13, 1933, in an aggregate amount of $3,607,981.58 for the three calendar years. (R. 20.) At that time the Board had not decided the issues before it (R. 21).

The Board's opinion was promulgated on April 17, 1935 (*Pierce Oil Corp.* v. *Commissioner,* 32 B. T. A. 403), and the Board held, among other things, that the taxpayer was entitled to special assessment; that recomputation of its income should be made in accordance with the opinion; that proper comparatives should be applied to the redetermined net income in order to determine its profits tax; and that, if necessary, the proceeding would be assigned for further hearing before the entry of judgment (R. 22).

On November 29, 1935, the parties agreed upon the special assessment rates. At or about that time, the Commissioner submitted to the taxpayer a recomputation of its liability under the opinion of the Board, showing a deficiency in tax without interest aggregating $2,042,187.67 for the years 1918 to 1920, inclusive. The Commissioner's recomputation and the stipulation as to special assessment rates were filed with the Board on December 3, 1935. (R. 22–23.)

On Febuary 18, 1936, the taxpayer submitted a written offer to pay $2,035,721.77 in complete settlement and satisfaction of the consolidated tax liabilities of itself and two other affiliated corporations, including all interest upon any deficiencies (R. 23).

On March 31, 1936, the taxpayer submitted a revised offer of settlement which differed from its prior offer in that it offered to pay a further sum of $27,819.20 in settlement of an outstanding assessment for additional interest and penalty upon its original tax for the year 1920 (R. 24). The formal offer of $27,819.20 in compromise contained the following statement (R. 26):

> Payment will be made upon notification of acceptance of this offer and of acceptance of offer in settlement of deficiencies and interest thereon for 1918, 1919, 1920, evidenced by letter of counsel for Pierce Oil Corporation, addressed to Commissioner of Internal Revenue under date of March 31, 1936.

In connection with the two offers in settlement and compromise, the taxpayer urged that any attempt to liquidate at that time could not under normal conditions result in obtaining a net amount for its assets of more than $1,250,000; that unassisted it could not raise enough money to pay its liability under the Board's decision; and that acceptance of the offer in compromise and the offer in settlement was suggested with a

view toward disposing of all of taxpayer's pending tax liabilities (R. 26).

Since the offer of $2,035,721.77 in settlement and satisfaction of the deficiencies and interest in regard thereto for 1918, 1919, and 1920, was in a lump-sum amount without separation as between tax deficiencies and interest, and since the Board before which the cases were then pending had jurisdiction to determine deficiencies in tax but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiencies, the Bureau of Internal Revenue, with the approval of the Commissioner, made a computation (see R. 28) designed to show what deficiencies in payment in respect of the tax plus interest at six per cent and at twelve per cent for certain periods would actually produce the total sum of $2,035,721.77 (R. 27). The taxpayer had no knowledge of the details of this computation until November 28, 1936 (R. 29), and there is no evidence that either the taxpayer or the Government considered that any definite portion of the lump-sum offer agreed upon specifically represented interest as such (R. 32). The computation was based on the deficiencies recomputed pursuant to the opinion of the Board and a reduction of the 1918 deficiency so that the total for all years would equal taxpayer's lump-sum offer of $2,035,721.77; it was made on the understanding that payment of such amount would be made by the taxpayer on April 30, 1936 (R. 27).

Both the offer of $27,819.20 in respect of the interest and penalty on the original assessment for 1920, and the offer of $2,035,721.77 with respect to the taxpayer's liability in connection with additional taxes and interest thereon for 1918 to 1920, inclusive, were considered by the Commissioner together and at the same time, and were accepted by him on the conditions outlined in the taxpayer's offers. These offers were approved by the Acting Secretary of the Treasury on April 27, 1936, under the authority of Section 3229 of the Revised Statutes. (R. 29.) Thereafter, on April 28, 1936, a written agreement was signed by counsel for the taxpayer, the Commissioner, and the General Counsel of the Treasury Department which included provisions as to the steps to be taken in carrying out the settlement (R. 29–30).

On April 30, 1936, the taxpayer delivered to the Collector two certified checks in the amounts of $2,035,721.77 and $27,819.20, and the Board entered deficiencies and abatements for the years 1918, 1919, and 1920. (R. 30–31.) Certificates of overassessment showing a correct tax liability and abatements for the years 1918, 1919, and 1920 in the amounts agreed upon as aforesaid were subsequently issued. Upon receipt thereof and of a schedule of overassessments by the Collector, appropriate entries were made upon his records on June 30, 1936, showing the total amount of $2,035,721.77 credited in payment of deficiency tax, deficiency interest, and delinquent interest as follows (R. 35):

Year	Deficiency tax	Deficiency interest	Delinquent interest	Total
1918	$450,314.84	$185,813.47	$226,200.25	$862,328.56
1919	517,637.97	213,593.02	260,017.71	991,248.70
1920	95,117.32	39,248.27	47,778.92	182,144.51
	1,063,070.13	438,654.76	533,996.88	2,035,721.77

The deficiency taxes shown above included both income and profits taxes but it cannot be determined from the record what portion represented income tax and what portion represented profits tax (R. 36).

If the Interest Computation Section of the Bureau of Internal Revenue had used an interest rate of six per cent from February 26, 1926, to April 30, 1936, without computing additional interest at twelve per cent from January 13, 1933, to August 30, 1935, as was actually done (see tabulation R. 28), the amount representing the difference between twelve per cent and six per cent interest would, in the distribution of the lump-sum offer of the taxpayer, have been reflected by the computation in the amount set forth therein as tax or deficiency in payment for 1918. In other words, the amount of $450,314.84 shown in the computation as tax, or deficiency in payment of tax for 1918, would have been increased in the amount of such difference in the interest computation, and the taxpayer would have paid the same total amount, i. e., $2,035,721.77 (R. 33–34).

If the amount shown as delinquent interest on the Collector's records had been computed at six per cent instead of twelve per cent for the period

October 25, 1933, to August 29, 1935, both inclusive, the amounts of such interest shown for each of the years 1918, 1919, and 1920 would have been reduced by the respective amounts of $70,601.53, $81,156.61, and $14,912.73, a total of $166,670.87 (R. 36).

On November 12, 1938, the taxpayer filed claims for refund which were rejected by the Commissioner of Internal Revenue on May 31, 1939 (R. 36). On the taxpayer's petition for refund, the Court of Claims denied recovery (R. 44).

ARGUMENT

1. Section 821 of the Revenue Act of 1938, *supra*, p. 2, upon which petitioners rely, applies only in cases where interest in excess of six per cent has been collected. The Court of Claims was unable to find that such interest was, in fact, collected. Petitioners' statement of the question presented and their argument ignore this controlling factor.

The court below found (R. 27) that the taxpayer's offer to pay $2,035,721.77, in settlement and satisfaction of certain deficiencies and interest in respect thereto for the years 1918, 1919, and 1920, was in a lump-sum amount without separation as between deficiencies and interest; that (R. 29) such offer, coupled with another not material here, was accepted by the Commissioner of Internal Revenue and approved by the Acting Secretary of the Treasury under authority of

Section 3229 of the Revised Statutes; and that (R. 30) the agreed lump sum was paid on April 30, 1936.

While the Government's claim included interest, it was compromised for a lump-sum which was less than the amount of taxes without interest (R. 23), it being urged that the taxpayer, unassisted, could not meet its liability under the outstanding decision of the Board of Tax Appeals (R. 26). The formal approval of the compromise was on April 27, 1936 (R. 29).

The court below also found (R. 27) that the Board had jurisdiction to determine deficiencies in tax but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiences; that deficiencies in tax only were computed in amounts which the Board might enter; that such deficiencies, with interest at six per cent and twelve per cent for certain periods would exactly produce the sum of $2,035,721.77; and (R. 33) that the taxpayer would have paid that sum even if interest had been computed only at six per cent, since the difference would have been reflected as tax or deficiency in payment for 1918.

Since the settlement involved cases pending in the Board of Tax Appeals, it was necessary to clear the Board's docket. It was also necessary to clear the records of the Collector. A computation was therefore made distributing the amount of the compromise offer between taxes and in-

terest. The taxpayer had no knowledge of the details of this computation until November 28, 1936 (R. 29), and there is no evidence that either the taxpayer or the Government considered that any definite portion of the lump-sum offer agreed upon specifically represented interest as such (R. 32). The computation referred to was incorporated in a signed agreement of April 28, 1936 (R. 29), and petitioners' contention that the taxpayer paid interest is predicated upon this agreement and an opinion of the Attorney General (38 Op. A. G. 94) said to bar compromise of the liability for twelve per cent interest.

The agreement was signed on behalf of the Government by the Commissioner of Internal Revenue and the General Counsel of the Treasury. The statutory representatives of the Government in compromise matters are the Commissioner and the Secretary of the Treasury. R. S. Sec. 3229, *supra*, pp. 2–3. The Commissioner and the Secretary had already approved the lump-sum compromise the day before the agreement of April 28, 1936, and the latter was a mere matter of administrative detail.

The opinion of the Attorney General in no way aids petitioners. As the court below made clear (R. 39), that opinion, as clarified (38 Op. A. G. 98), did not bar the compromise of the twelve per cent interest requirement.

The Court of Claims was clearly correct in holding that the compromise did not contemplate pay-

ment of specific sums for taxes for specific years, and specific sums for interest at certain rates for certain periods (R. 40–41). The inapplicability of Section 821 to the facts of this case is therefore apparent.

2. Section 821 deals exclusively with interest paid "on delinquent income, estate, and gift taxes." The deficiency taxes in question here included both income taxes, which are dealt with in Section 821, and profits taxes, which are not dealt with in Section 821 (R. 52). Since no allocation has been made as between the portion of the compromise representing income taxes and the portion representing profits taxes, it is apparent that no proper basis has been supplied for the application of Section 821 even if excessive interest was paid.

3. Petitioners assert a conflict (Pet. 11) with *Staten Island Hygeia Ice & Cold S. Co.* v. *United States,* 85 F. 2d 68 (C. C. A. 2d), and *Cloister Printing Corp.* v. *United States,* 100 F. 2d 355 (C. C. A. 2d). Those cases expressly distinguished an earlier decision of the Court of Claims in *Hord* v. *United States,* 59 F. 2d 125, and the distinctions are equally applicable here.[1] Moreover, the asserted conflict relates only to an alter-

[1] *Big Diamond Mills Co.* v. *United States,* 51 F. 2d 721 (C. C. A. 8th), and *Colorado Milling & Elevator Co.* v. *Howbert,* 57 F. 2d 769 (C. C. A. 10th), referred to by petitioners (Pet. 9), turned on the terms of the compromise agreements there involved.

native ground of the decision below, for the court's inability to find a payment of interest in excess of six per cent is sufficient to support its judgment.

CONCLUSION

No question of general importance is presented and there is no conflict. The decision of the court below is correct and the petition should be denied.

Respectfully submitted.

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MAY 1945.

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